CHILDREN'S RIGHTS

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U.S. Department of State
CA/OCS/PRI
Adoption Regulations Docket
Room SA-29
2201 C Street, NW
Washington, DC 20520

RE: Docket Number State/AR-01/96

Dear Sir or Madam:

Thank you for the opportunity to provide the Department of State with comments on the proposed regulations implementing the Intercountry Adoption Act.

First, we wish to commend the Department for the excellent drafting of practice standards in Subpart F of the regulations. We are very pleased to see, in particular, standards that:

- Hold US agencies legally liable for the actions of other agencies and persons in the US and abroad;
- Require written disclosures of all fees and the other requirements regarding fees to prospective adoptive parents;
- Mandate higher educational credentials for social workers; and
- Require preparation and training for prospective adoptive parents (although 10 hours may not be sufficient, the existence of such a requirement is a very important first step).

What is of serious and overarching concern, however, is that there is no assurance that the accrediting bodies will actually hold private agencies to these standards. As opposed to the "comprehensive, stringent standards for US accreditation and approval" that the preamble asserts is presented in the regulations, we regrettably find a system that falls far short of the envisioned system of oversight and regulatory control that the Intercountry Adoption Act (IAA) promised.

Our concerns are based on the decision that has been made to put into place a "private sector model for accreditation/approval" – which indeed may be authorized by the IAA but which, nonetheless, does not create a strong system of oversight and regulatory control. The Department

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has endorsed an approach in which it appears that the Department itself has retained little enforcement authority but instead has ceded this authority to the accrediting bodies. It is of deep concern that private accrediting organizations will be given almost complete authority to oversee the practices of international adoption agencies. This proposed approach raises particular concerns for three reasons. First, the accrediting entities derive revenues from the accreditation process, giving rise to a strong conflict of interest. These accrediting entities, as businesses, can be expected to make every effort to sustain (and, one would expect, increase) current and future revenues from the agencies they accredit. Despite this reality, they are being asked to oversee and sanction these very agencies. Second, concern arises from the fact that there will be multiple private accrediting entities, each of which will provide some level (but not necessarily the same level) of oversight and enforcement, leading to, at best, an uneven approach. Finally, as we discuss next, there is, in reality, no mandate that the adoption agencies adhere to the standards of practice set forth in Subpart F.

The absence of any guarantee that accrediting bodies will use the articulated standards in accrediting the private agencies is extremely troubling. The proposed regulations set the standard for accreditation/approval as "substantial compliance" and an opportunity to improve in lieu of a stricter "licensing scheme." While it may be true that "substantial compliance" is the standard used by the Council on Accreditation (COA) and other bodies that accredit on a voluntary basis, we are not of the understanding that accrediting bodies such as the Joint Commission for the Accreditation of Health Care Organizations use this relatively low standard in their accreditation procedures. Three rationales are advanced for the choice of a "substantial compliance" standard, all of which are of deep concern.

- First, the preamble states that it is not possible to know which of the practice standards in Subpart F "should always be mandatory." The very strength of the proposed regulations is Subpart F and yet there is a concession at the outset that these standards may or may not be particularly important – at least not to the extent that they are mandated and enforced.

- Second, the preamble claims that poor social work practice, though "unfortunate," should not be sole basis for withdrawing accreditation. It would be very interesting if the drafters of the regulations could provide examples of what, if any, "unfortunate" social work practice might be the basis for withdrawing accreditation. It can be anticipated from this rationale that virtually any practice with negative consequences for children and families would simply be deigned a regrettable incident.

- Third, the preamble states that accrediting entities need discretion to determine which (if any) of the standards should be required. The accrediting bodies presumably will make this call independently with no oversight from the Department and quite possibly with no uniformity. Other regulatory provisions that, at first blush, might appear to address these issues do not mitigate our concerns in this area. For example, the point system that is referenced does not offer any assurance of quality because the proposed regulations make clear that it will not be divulged to anyone except the applicants. Any assumption that at some point, agencies' actual performance will be the basis for renewal of accreditation would be misplaced because the proposed regulations state that once an agency or person has been accredited/approved and is applying for renewal, "the accrediting agency *generally* will . . . consider the agency's or person's actual performance when deciding whether it is in substantial compliance with the standards." (emphasis added) It appears that an accrediting body is free to continually re-accredit agencies without reference to the agency's actual performance with regard to any or all standards of practice.

Particularly troublesome are the many references in the preamble to the Department's overriding concerns regarding small adoption agencies. The preamble says that the goal is "to mirror current practices and to provide regulatory flexibility so that the regulations do not negatively affect small agencies and persons and other providers." It is mystifying why concerns about the impact on small entities "were of utmost importance in the Department's decision making process." It might have been expected that the protection of children, their birth families and prospective adoptive families were "of utmost importance," but such a statement is not made in the preamble or the regulations. The Department instead "particularly welcomes comment on the effect of these regulations on both non-profit and for-profit small entities."

In addition, the preamble asserts that minimal intervention is in order because "current practice does not give rise to the types of abuses that the Convention and the IAA seek to curtail." Nonetheless, on at least one critical issue on which abuses are well-known to be rampant – the monetary aspect of adoption – the Department asserts that it does not know what current practice actually is. It is perplexing to see that after more than 3 years of study, the Department states that it is uncertain about the true costs of adoption and the portion of adoption fees that is attributable to U.S. agency fees, to travel, and to sending country-imposed costs. The list of questions on page 54071 on which the Department would like commentators' responses indicates that the Department believes itself to be unaware of the cost issues or, presumably, the abuses in this area. Given the asserted absence of understanding in this area, the Department's position that current practice is essentially non-abusive is difficult to comprehend. It may, however, explain the very limited response to – if not general acceptance of – adoptive parents having to make "direct cash transactions" (often in the thousands of dollars) in other countries – a practice that presents a host of safety, legal, and ethical issues. This practice also potentially conflicts with laws that preclude or significantly limit the amounts of cash that U.S. citizens may carry abroad and pay to individuals and organizations in other countries.

Finally, we would like to make two additional comments on specific aspects of the regulations which are of deep concern. First, we are troubled by the lack of clarity around the "Complaint Registry" whose "precise functions . . . will be detailed in an agreement between the Department and the Complaint Registry." We understand that the Secretary will establish the Complaint Registry within the Department and thus, are unclear why a contract would be needed in the future to specify the functions of the Registry. The vagueness of this mechanism raises questions as to its actual role and effectiveness and even who, in fact, will truly be responsible.

Second, we are concerned about the requirements regarding emigrating children. "Sufficient reasonable efforts to find a timely adoptive placement for the child in the United States" is too vague to be meaningful, especially with the additional regulatory language that allows that efforts not be made if it is determined that "making such reasonable efforts would not be in the best interests of the child." The tenor of this provision suggests that absent specific procedural provisions that state otherwise current practice will simply continue as the "best interests" provision will be invoked for each and every child (including infants) who are placed out-of-country with adoptive families. We also are concerned about the vagueness of "due consideration" to the child's ethnic, religious and cultural background – especially given the provision that the child should receive services in the new country that address "difficulties in making any cultural, religious, racial, ethnic or linguistic adjustment." Again, absent specific procedural provisions that state otherwise, the tenor of this provision suggests that these aspects of a child's identity will likely be given little attention in the decision-making process.

We appreciate the opportunity to provide the Department with comments. We are hopeful that upon review of these comments and comments submitted by others that the Department will

give renewed consideration to the proposed regulations and will develop what we all wish to see in the regulations: truly "comprehensive, stringent standards for US accreditation and approval" of agencies that provide international adoption services. It would indeed be highly regrettable if the ultimate regulatory framework put into place in the United States failed to meet the requirements of the Hague Convention, thereby defeating years of hard and sustained work to ensure oversight and accountability in the international adoption process.

Sincerely,

Madelyn Freundlich

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Policy Director